Supreme Court, U.S.
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No. 98-775

In The

# Supreme Court of the United States

October Term, 1998

GORDON MILLER,

*Petitioner,*

v.

FRED VANNATTA, GEORGE BOEHNKE, AND CENTER TO PROTECT FREE SPEECH, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

When they oppose petitions for certiorari, respondents frequently by rote challenge the petitioner's standing to invoke the judicial power of the Court to decide the questions presented. When that tactic fails, they argue that the questions presented were correctly decided below. And when that tactic fails, they disparage the importance of the questions presented.

Respondents' brief in opposition reaffirms that rule.

### I. PETITIONER HAS STANDING TO INVOKE THE JUDICIAL POWER OF THE COURT TO DECIDE THE QUESTIONS PRESENTED.

In *N. E. Florida Contractors v. Jacksonville*, 508 U.S. 656, 663-64 (1993), the Court summarized the test a litigant must satisfy to have standing to invoke the Court's art. III judicial power as follows:

> It has been established by a long line of cases that a party seeking to invoke a federal court's jurisdiction must demonstrate three things: (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;" (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court;" and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect

> of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative." (citations omitted).

In their brief in opposition respondents contend that petitioner Gordon Miller has not satisfied the first prong of the *N. E. Florida Contractors* test because the court of appeals' invalidation of art. II, § 22, of the Oregon Constitution did not inflict an "injury in fact" on petitioner Miller.

In reasoning to that patently wrong conclusion, respondents concede, albeit implicitly, that petitioner has a legally protected interest in participating both as a voter and as a candidate in elections for Oregon State elective office. Respondents also concede, again albeit implicitly, that the State of Oregon's implementation of the court of appeals' decision invalidating art. II, § 22, of the Oregon Constitution invaded petitioner's interest. Respondents then attempt to avoid the consequences of those concessions by arguing that implementation of the court of appeals' decision has not inflicted a "particularized" injury on petitioner because petitioner's interest in participating as a voter and candidate in Oregon elections is "shared with the public at large." Brief in Opposition at 1. However, that self-serving conclusion contravenes the Court's holdings in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Akins*, 118 S.Ct. 1777 (1998).

In *Buckley* several plaintiffs were candidates for federal elective office who, as respondents concede, the Court determined had standing to invoke the Court's judicial power to determine whether the United States Constitution prohibited Congress from imposing limitations on the making of certain campaign contributions

and expenditures in the elections in which the candidate plaintiffs intended to participate. Like the *Buckley* candidate plaintiffs, petitioner Miller is a future candidate. *See* Gordon Miller Petition for Certiorari, Appendix at 52 (attestation that "I intend to again seek elective public office. And when I do, I intend to again refuse to except [sic] campaign contributions except from individuals who are residents of the election district in which I am seeking election").

In *Akins* the Solicitor General argued that voter plaintiffs did not have standing to invoke the Court's judicial power to obtain review of a decision by the Federal Election Commission that the American Israel Public Affairs Committee (AIPAC) was not a "political committee" that the Federal Election Campaign Act (FECA) requires to disclose its membership and report its campaign contributions and expenditures. The Court rejected that contention on the ground that

> the "injury in fact" that [the voter plaintiffs] have suffered consists of their inability to obtain information – lists of AIPAC donors (who are, according to AIPAC, its members) and campaign-related contributions and expenditures – that, on [the voter plaintiffs'] view of the law, the statute requires that AIPAC make public

and that "[the voter plaintiffs'] injury seems concrete and particular." *FEC v. Akins*, *supra* at 1784.

In this action, the district court and court of appeals' invalidation of art. II, § 22, of the Oregon Constitution required petitioner Miller to participate in 1996 and 1998 as a voter in Oregon elections whose outcomes were unfairly influenced by the expenditure by candidates of

campaign contributions that were made by contributors who were not residents of petitioner Miller's election districts and who had no right to vote for the candidates to whom the contributions were made. Like the particularized injury inflicted on the voter plaintiffs in *Akins*, campaign contributions made during the 1996 and 1998 Oregon elections by non-residents of petitioner Miller's election districts inflicted a particularized injury on petitioner Miller.

In addition to contravening *Buckley* and *Akins*, respondents' analysis of the "particularization" element of the "injury in fact" requirement contravenes holdings in myriad other decisions in which the Court has afforded voters standing to challenge the validity of procedures pursuant to which elections in which they and other voter residents of their election districts participated. *See, e.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (voters have standing to challenge constitutionality of a poll tax); *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (voters have standing to challenge constitutionality of statute that controlled eligibility to participate in primary elections); *Chisom v. Roemer*, 501 U.S. 380 (1991) (voters have standing to challenge validity of the election of judges in multi-candidate election districts); *Baker v. Carr*, 369 U.S. 186 (1962); *Abrams v. Johnson*, 117 S.Ct. 1925 (1997) (voters have standing to challenge the constitutionality of the apportionment of election districts in which elections in which they participate are conducted).

Finally, if respondents' analysis of the "particularization" element of the "injury in fact" requirement is correct, art. III of the United States Constitution empowers respondents and other campaign contributors to invoke

federal judicial power to obtain an adjudication of the constitutionality of a campaign finance system that limits their ability to make contributions to influence the outcome of elections in which they have no right to vote, but art. III denies individuals who participate in the same elections by voting or as candidates from invoking the same judicial power to obtain an adjudication of the constitutionality of the same campaign finance system.

But art. III mandates no such anomalous result.

## II. RESPONDENTS MISUNDERSTAND THE STANDARDS THAT GUIDE THE COURT'S EXERCISE OF DISCRETION TO GRANT A PETITION FOR CERTIORARI.

Supreme Court Rule 10 describes the standards that guide the Court's exercise of discretion to grant a petition for certiorari.

Respondents' brief in opposition urges the Court to deny petitioner Gordon Miller's petition for certiorari because, in respondents' judgment, the court of appeals correctly decided the questions that the petition presents. However, whether a court of appeals correctly decided a question is not a Rule 10 standard that guides the Court's exercise of discretion. Rather, with respect to the Court's decision to grant or deny petitioner Miller's petition, the guiding standards are whether the questions the court of appeals decided are of sufficient public importance that they should be decided by this Court, and whether the court of appeals' decision conflicts with relevant decisions of this Court. *See* SUP. CT. R. 10(c).

Petitioner Miller's petition for certiorari presents two questions of paramount public importance, both of which satisfy the Rule 10(c) standards.

## CONCLUSION

For both the foregoing reasons and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 1998